

## **MINUTES**

### **MONTANA SENATE 57th LEGISLATURE - REGULAR SESSION COMMITTEE ON JUDICIARY**

**Call to Order:** By **CHAIRMAN LORENTS GROSFIELD**, on February 13, 2001 at 9:15 A.M., in Room 152 Capitol.

#### **ROLL CALL**

**Members Present:**

Sen. Lorents Grosfield, Chairman (R)  
Sen. Duane Grimes, Vice Chairman (R)  
Sen. Al Bishop (R)  
Sen. Steve Doherty (D)  
Sen. Mike Halligan (D)  
Sen. Ric Holden (R)  
Sen. Walter McNutt (R)  
Sen. Jerry O'Neil (R)  
Sen. Gerald Pease (D)

**Members Excused:** None.

**Members Absent:** None.

**Staff Present:** Anne Felstet, Committee Secretary  
Valencia Lane, Legislative Branch

**Please Note:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**

Hearing(s) & Date(s) Posted: SB 282, 2/5/2001  
Executive Action: Regarding Committee bills

**COMMITTEE BILLS DISCUSSION****AMEND 45-8-104 PROPOSAL**

**SEN. JERRY O'NEIL** proposed an amendment to 45-8-104. He felt it was unconstitutional because it prohibited conduct that agitated a crowd. He thought there were legitimate times when a crowd should be agitated, as in the case of a politician rallying support. The amendment would allow crowd agitation for political conduct. Originally he wanted to abolish the section entirely, but he decided to retain the prohibition to incite a riot by prisoners. It allowed jailors to deal with those situations.

**Motion:** **SEN. O'NEIL** moved **A COMMITTEE BILL** that **SECTION 45-8-104 OF MCA BE AMENDED**.

**Discussion:**

**SEN. RIC HOLDEN** thought the rationale behind the bill was wrong because the committee shouldn't set a policy endorsing agitating riots. He understood the bill to enhance the Constitutional right of rioting by repealing parts of the incitement to riot statute. He thought it was a public safety issue.

**SEN. MIKE HALLIGAN** did some research to find out the origin of SB 25, the flag burning bill, which also dealt with rioting. He was led to case law in Illinois to see if anyone challenged the general riot statute. No one did. He also found that no one challenged it for vagueness, over breadth, or First Amendment issues. The U.S. Supreme Court said that states could regulate eminent, lawless conduct. He agreed with **SEN. HOLDEN** because by removing parts of the statute, it led to the inability of the local law enforcement to regulate the eminent, lawless conduct. He wanted to leave the existing law to allow the court to provide direction if it was ever challenged.

**SEN. DUANE GRIMES** asked why it wasn't in bill form earlier.

**SEN. O'NEIL** replied it came to his attention after the flag burning bill.

**SEN. GRIMES** said unless compelling circumstances warranted the bill, he felt it was not something the committee should adopt due to time constraints.

**CHAIRMAN LORENTS GROSFIELD** informed them that today was the deadline for submitting committee bills. He understood the amendment limited the incitement to riot to the prison situation only. In terms of time, it was tight and he didn't feel the bill

could be done properly. According to the rule, 30-120, at least 3/4 of all members had to vote to adopt the legislation. He said that would be seven members and he sensed that this proposal didn't have seven ayes.

**Vote:** Motion to amend 45-8-104 failed 1-7 with SEN. O'NEIL voting aye, SEN. WALT McNUTT excused.

#### FELONY NON-SUPPORT PROPOSAL

##### Discussion:

**SEN. STEVE DOHERTY** discussed his idea. According to county attorneys, there was a problem in developing evidence for the felony non-support cases. Child Support Enforcement did a good job in keeping up-to-date on the child support cases and finding out where the money was and distributing it. However, when someone was working off the payroll, under the table, working half time when full time was an option, and not reporting their entire income, those instances were clearly a criminal intent to avoid responsibility. He said the CSED didn't have the training, capacity, or capability to investigate those kind of cases. They suggested giving authority to the state Criminal Investigative Bureau to investigate those types of crimes. In criminal non-support cases it would allow the CSED to have successful prosecutions. He didn't know why it wasn't brought forward earlier. He offered to carry the bill if accepted.

**SEN. DUANE GRIMES** asked if this involved the Medicaid fraud unit.

**SEN. MIKE HALLIGAN** responded that it was the Criminal Investigation Bureau people. They did drug and homicide type investigations.

**SEN. GRIMES** asked about their current workload.

**SEN. DOHERTY** said he didn't know about that. He figured it was massive.

**SEN. HALLIGAN** said it was a good idea, but the magnitude was very great. He noted that these cases involved extreme deadbeat dads, not the ones who held a regular job, had a permanent residence, and utilized visitation. He felt the CIB could not do an effective job without additional staff. He suggested sending a strong letter to the Attorney General requesting the CIB allocate resources to a few of the most egregious cases.

**SEN. DOHERTY** agreed that a strong letter in lieu of legislation, and acknowledging the budget crunch, it would be a good idea to

urge them to make some resources available. He also mentioned that it might be cheaper to provide criminal training to the CSED. He really felt that for felony non-support cases, the CSED needed some tools.

**SEN. JERRY O'NEIL** felt that suing the employer for not garnishing the wages or hiding the fact that the deadbeat worked there was another way to handle the deadbeat situation. He argued a good judgement would keep businesses from employing the deadbeat.

**SEN. HALLIGAN** said there were criminal penalties for businesses who failed to cooperate.

**Motion/Vote:** **SEN. DOHERTY** moved **felony non-support proposal**.  
**Motion failed 2-6** in a voice vote.

**Motion:** **SEN. DOHERTY** moved **WRITING A LETTER TO THE ATTORNEY GENERAL**.

**Discussion:**

**CHAIRMAN LORENTS GROSFIELD** wanted the draft letter circulated so the committee knew what it contained.

**SEN. RIC HOLDEN** didn't want his name on a letter asking the Attorney General to allocate money without providing any.

**CHAIRMAN GROSFIELD** said the letter would inform the Attorney General about the issue and ask them to create a proposal.

**SEN. DOHERTY** said that was his intention.

**SEN. HOLDEN** it was one thing to ask for a proposal, but another to ask for money allocation.

**SEN. DOHERTY** said the CIB had definitive staff, money, and effort to pursue cases. He said they couldn't do them all. Therefore, the letter acknowledged the staff constraints and resources, the committee felt this issue was a high priority, and the CIB should pay attention to it if they could in any way, shape, or form. Then, next session, if it proved to be a big issue, money could be allocated at that time.

**CHAIRMAN GROSFIELD** said since a bill didn't exist, there wasn't a deadline either. Therefore, he suggested to withdraw the motion, draft the letter later, then bring it to the committee.

**SEN. DOHERTY** agreed.

**SEN. O'NEIL** suggested having the head of the CIB give an informational presentation to the committee.

**CHAIRMAN GROSFIELD** said that was a possibility.

**SEN. DOHERTY** said after transmittal, that would be a good idea.

**CHAIRMAN GROSFIELD** said that visit might be helpful before a letter was drafted.

**SEN. DOHERTY** withdrew his motion.

**NEW COMMISSION ON PRACTICE PROPOSAL**

**SEN. STEVE DOHERTY** presented his second idea for a committee bill. The bill would establish a new Commission on Practice independent of the Court and Bar Association and funded by assessments on lawyers. It would also have rules and procedures for due process for those attorneys referred to the new Commission on Practice. He said it was brought to his attention after the original deadline. He thought it was an intriguing idea, but the state Supreme Court said they were looking into reviewing the entire Commission on Practice rules and hoped to have new rules out soon.

***{Tape : 1; Side : B}***

He said the negatives against the Commission on Practice in Montana were accurate. He didn't know if this proposal was the answer, but was one answer.

**Motion:** **SEN. DOHERTY** moved **THIS COMMITTEE BILL IDEA.**

**Discussion:**

**SEN. JERRY O'NEIL** said he really liked it because it dealt with the same issue he raised with SB 109.

**SEN. MIKE HALLIGAN** reiterated that a compelling interest needed to be present to properly handle the bill at this time. In light of the fact that the Supreme Court was looking into the matter, he didn't feel like it should be taken on as a committee bill.

**CHAIRMAN LORENTS GROSFIELD** responded it was late and he didn't particularly like "good 'ole boys clubs" and they did need to be shaken up. He saw some value in that. He suggested sending the idea to the Supreme Court to let them know the committee was considering the issue.

**SEN. DUANE GRIMES** said he didn't know the level of concern among practicing attorneys. It seemed like there was great angst over **SEN. O'NEIL's** bill. He wondered if it was a big enough issue to put into an interim committee for consideration.

**SEN. DOHERTY** said it was a good idea and the Law, Justice, and Indian Affairs Committee should have an interim study.

**Substitute Motion:** **SEN. DOHERTY** made a substitute motion **CREATION OF SUB-COMMITTEE.**

**Discussion:**

**SEN. RIC HOLDEN** felt that the Supreme Court should handle it for now and let the next session deal with it.

**SEN. O'NEIL** wanted the Law, Justice, and Indian Affairs Committee to also look into the association that nominated judges. He said it wasn't really legislative nor judicial, but someplace between the two. He felt a neutral body was needed to deal with the issues rather than the legislature.

**CHAIRMAN GROSFIELD** asked if the committee would work with the Supreme Court on the issue, or just to let the Law, Justice, and Indian Affairs Committee handle it.

**SEN. DOHERTY** said the committee should work with the Supreme Court.

**SEN. GRIMES** hoped it was contingent on **SEN. GROSFIELD** chairing the committee and **SEN. DOHERTY** and **SEN. HALLIGAN** being members of the committee.

**SEN. HALLIGAN** replied they were all term-limited out. He said a resolution would be needed to create the sub-committee and **SEN. GRIMES**, as the chair would designate the structure of the committee.

**CHAIRMAN GROSFIELD** said interim committees were allowed to set their own agendas.

**Vote:** Substitute Motion to create a subcommittee **carried 7-1 with Holden voting no.** **SEN. McNUTT** excused.

**HEARING ON SB 282**

**Sponsor:** **SEN. BILL CRISMORE, SD 41, LIBBY**

**Proponents:**                    **REP. AUBRYN CURTISS, HD 81**  
                                     **Jim Regnier, Supreme Court Justice**  
                                     **Mike Prezeau, District Court Judge of the**  
   **19<sup>th</sup> Judicial District**  
                                     **Robbin Redman, victim of asbestosis**  
                                     **Don Judge, AFL-CIO**  
                                     **Rita Windom, Chairman of Lincoln County Board**  
   **of Commissioners**  
                                     **Bud Clinch, Legacy Legislature, Governor's**  
   **Council on Aging**  
                                     **Roger Sullivan, attorney representing victims**  
                                     **Patrick Judge, Montana Environmental**  
   **Information Center**

**Opponents:**                    **None**

**Opening Statement by Sponsor:**

**SEN. BILL CRISMORE, SD 41, Libby,** opened on SB 282 explaining why the bill was brought forth and its importance. He said the community of Libby had been severely affected by the disease of asbestosis from the R.W. Grace Mine. He said over 80 cases had been filed with the District Court. It was nearly impossible to have the cases heard in a timely manner. He noted the emotional aspect of the issue. He spoke to the District Court Judge, the plaintiff's attorneys, and W.R. Grace representatives in creation of the bill. All were in favor of the legislation including the county commissioners. He said the bill would bring the community together, help a large group of people, and perhaps even begin the healing process that the victims were truly being treated accordingly.

**Proponents' Testimony:**

**REP. AUBRYN CURTISS, HD 81,** said her district encircled the city of Libby. She reiterated that justice delayed was justice denied. She submitted that the plaintiffs didn't have time on their side. She requested that the court be located as close to Libby as possible due to the hardship of the plaintiffs.

**Jim Regnier, Supreme Court Justice,** reported that the Supreme Court unanimously supported the legislation. He said the Court had received a petition requesting supervisory control over case management in Judge Prezeau's District Court. Review of the petition caused alarm because of the pending cases, but more importantly because of the projected number of cases (300-400) to appear. He felt this was a unique situation, but one that had the potential to cause great economic and access to Justice

difficulties. He stated the problem: the Justice's current docket included criminal, civil, and domestic relation matters. However, in addition, the Justice had to deal with complex, continuing litigation. Sooner or later, he said the victims would not be able to have their cases heard in a timely manner. He named the team of people who had looked at this issue: **SEN. CRISMORE**, himself and Justice Nelson, Roger Sullivan who represented 97% of the asbestos cases, and the law firm for W.R. Grace. They wanted to create a solution where the asbestos cases could be handled by a separate court, processed in a timely fashion by someone who would be familiar with the unique issues of asbestos cases. This would provide an efficient method of resolving the cases and providing compensation in a timely fashion to the victims. He said the bill allowed the parties to stipulate the case be heard in the asbestos court. It would be presided over by an attorney licensed to practice in the state of Montana (a judge pro tem) agreed upon by the parties. The litigation preserved the right to jury trial, and the case would be tried status quo. He restated that both sides of the issue agreed on the bill. He noted the finances of the bill provided for a two year period. Another aspect concerned where the cases would be tried. Justice Donald Meloy of the U.S. District Court of Montana agreed to make a federal court room available at no cost to the state. He felt it was unreasonable to have the District Judge preside over his normal workload as well as these unique cases.

**Mike Prezeau, District Court Judge of the 19<sup>th</sup> Judicial District**, said in 1995 there were three pending asbestos cases. Currently, 158 cases had been filed. Of those, 83 were still pending. Thirty-eight were removed to federal court in Pennsylvania that could be re-referred to the District Court. Once the magnitude of litigation became obvious, he implemented some special procedures to handle the cases: established four separate jury terms in the year especially for Grace cases; implemented a system where the plaintiffs' attorneys could identify the cases where the plaintiff was the sickest, so the case could be heard in the next jury term before the plaintiff died; he also appointed a special settlement master. He felt these procedures would handle the situation. However, they weren't enough because two things had made it nearly impossible. 1) unrelenting media coverage of the situation that began in 1999.

**{Tape : 2; Side : A}**

2) a statistically significant number of people had been identified as asbestos victims. He speculated that a number of them would turn into cases. Changing the venue created even more of a hardship on the judge and the plaintiffs. The judge had to remotely deal with pending court issues for 1 or 2 weeks while he was at the asbestos cases. In effect, he was taking 2 week



"vacations" several times a year. He also noted the costs of sending the judge and court on the road multiple times a year. He mentioned that this issue was a cloud over the town and was a huge inescapable problem. He said that the creation of one court to resolve these cases was greatly needed to help rectify many of the problems.

**Robbin Redman, victim of asbestosis**, presented her testimony in favor of SB 282, **EXHIBIT(jus36a01)**.

**Don Judge, AFL-CIO**, said it was likely one of the most important pieces of legislation to come before the legislature. He mentioned the multitude of people affected by the disease and suggested this situation was America's Chernobyl. He believed this legislation was an attempt to justly handle the court cases of the people affected by the disease contracted as a result of the mine in Libby.

**Rita Windom, Chairman of Lincoln County Board of Commissioners**, presented her testimony in favor of the legislation, **EXHIBIT(jus36a02)**.

**Bud Clinch, Legacy Legislature, Governor's Council on Aging**, announced he moved to Libby seven years ago. In his capacity on the various councils, he became aware of the asbestos problem and its far reaching effects. He attested to the problems the disease caused and urged support of the bill.

**Roger Sullivan**, attorney representing victims, presented his testimony, **EXHIBIT(jus36a03)**.

**Patrick Judge, Montana Environmental Information Center**, related that the EPA said this issue would top anything done in the SuperFund program. He said it was a public health tragedy of staggering proportions. The MEIC supported the bill.

#### **Opponents' Testimony:**

**None**

#### **Questions from Committee Members and Responses:**

**SEN. STEVE DOHERTY** asked for explanation of removal to the federal court in legal terms and how to represent people.

**Roger Sullivan, attorney representing victims**, replied under the Constitutional system, separate tiers of federal and state court systems existed. He said Tort law found resolution in state courts, especially with in-state defendants. The federal system

of limited jurisdiction handled cases involving no in-state defendants.

**{Tape : 2; Side : B}**

He noted that they had asked that cases not be removed to federal court. He believed that the creation of this court would handle fairly all the claims from Libby, Montana.

**SEN. JERRY O'NEIL** fully supported the bill, but was concerned that after the first judgment, one of the sides would want to choose a new judge. He asked if the parties could objectively, collectively choose a judge or if someone else should do that. **Jim Regnier, Supreme Court Justice**, replied that Constitutional considerations prompted the decision to allow both parties to agree on a judge. He thought that the dilemma that the claimants' attorneys faced was that they must pursue the course of action that would efficiently provide compensation in a timely manner. He said the nature of the disease made it so the plaintiffs might not survive their day in court. He expected this streamlined approach to continue to be used by both parties.

**SEN. O'NEIL** felt that it was likely that a different judge could be chosen for each case and the potential for judges would be exceeded. He noted that currently there were three chances to challenge a judge, but the bill allowed for more. **Mr. Regnier** said that once the parties agreed to go into this court, they couldn't substitute the judge; they couldn't use the right of substitution.

**SEN. O'NEIL** further questioned if it applied to all of the plaintiffs. **Mr. Regnier** said every case was stipulated as to the case, not to the attorneys.

**SEN. O'NEIL** replied yes, and that meant that each case could have a different judge. With 80 different cases, each plaintiff could agree to a different judge, they didn't all have to go to the judge selected in the first case. **Mr. Regnier** responded that one law firm represented 97% of the current claimants and one law firm represented W.R. Grace. He said the legislation called for an asbestos judge, agreed to by both sides. He believed that the judge selected would handle all the cases, not be different for all 80 cases because both sides agreed.

**CHAIRMAN LORENTS GROSFIELD** asked for a brief sense of the disease and why the urgency factor. **Mr. Sullivan** began with a clarification to **SEN. O'NEIL's** questions. He said they had already made significant progress with the attorneys for W.R. Grace. The judge and the venue provisions were permissive. They

had already agreed on the stipulated venue for all 80 clients. He said if the court was created, he said they would come. In terms of the disease, he listed three major different diseases: 1) asbestosis 2) lung cancer 3) mesothelioma, a quick, progressive and fatal disease. He said those were the only diseases that were sued for. He said all three were almost always fatal, but varied widely in progression of the disease. Some had a long time between diagnosis and death as with asbestosis, a micro scarring of the pleural surfaces of the lungs. Over a period of time, it limited the ability to breath. He said that not everyone with a mild case of asbestos would go into a full-blown highly progressed disease state. Experience showed that those with lung cancer and mesothelioma died relatively quickly. He noted that **Judge Prezeau** had allowed the attending physicians to determine those with highly advanced progression of asbestos related diseases to hold their cases before those with milder, less advanced progression of the disease. He hoped the asbestos court would have a similar procedure.

**CHAIRMAN GROSFIELD** questioned the technical issues of the fiscal note regarding funding. **SEN. CRISMORE** said he met with the Governor's budget director. He said it could fall under state special revenue. The funding issue was open as to how to fund the project. He thought maybe the county could also help fund it.

**CHAIRMAN GROSFIELD** questioned any judicial ethical questions of putting the cost of the court solely onto W.R. Grace. **Mr. Regnier** replied it would be quite challenging not only to ask them to pay the claim, but also to fund the process.

**SEN. STEVE DOHERTY** responded to the comment that, "if it was built, they would come". What guarantee was there that if it was build, W.R. Grace would not take the cases to federal court. **Mr. Sullivan** said there was not possibility for removal of the current pending 80 cases. The cases not yet filed, could potentially be removed. He had requested consideration that if a fair venue was selected that they not remove future cases. They hadn't made a commitment to that yet, but it was on the table. They were hopeful that it would be positively resolved.

**SEN. DOHERTY** asked for neutral reasons why it would be taken to federal court, then with an advocates understanding why it would be moved to federal court. **Mr. Sullivan** replied fundamentally it was a due process right. A foreign citizen in a foreign state could be detrimentally treated. Therefore, the Judiciary Act allowed the right of removal in the case of a foreign defendant without any other local in-state defendants. In terms of the circumstances in Libby, they named local defendants, (local

managers of W.R. Grace) although one of them had died he was still named. W.R. Grace disputed the use of local defendants.

**SEN. DUANE GRIMES** asked about the other cases around the country that could come from that. Were they heard on the federal level, or if they originated here, could they end up in this court.

**Mr. Sullivan** replied that other than about 30 claims, the claims in Philadelphia were not linked to Montana. The 30 were removed because they had only federal jurisdiction. He believed the motion to remand back to Montana would occur. The other cases not stemming from Libby, Montana, would not come to the Montana court. He said Libby was "ground zero" because it had the most extensive cases of asbestos related diseases.

**SEN. GRIMES** followed up observing that the cases in this court would directly relate to people living in Libby now or in the past. **Mr. Sullivan** agreed. He said the definitional sections required asbestos exposure from vermiculite. By virtue of the drafting, it was relatively, consciously self-limiting. It was a court designed for a unique and overwhelming problem, but was not designed to deal with the extensive asbestos litigation that involved the country.

**SEN. RIC HOLDEN** questioned the termination of the court.

**Mr. Sullivan** said there was no provision for termination of the court, except that it required biennial appropriations. It contained an inherent sunset provision because it would take a compelling case to be made to refund the court in two years. Without Senate Finance and the Joint Appropriations Committees' funding, it would not exist.

**SEN. HOLDEN** was concerned because it put a lot of pressure on future legislatures to keep it going. He argued that Eastern Montanans would not want to fund it forever. They would like to see an end if they were paying for it. **Mr. Sullivan** responded that the self limiting mechanism was extremely difficult to achieve. A very compelling case needed to be made to receive appropriations. He pointed out that bi-partisan support in both houses would be needed to keep the court in operation.

**SEN. HOLDEN** asked if both sides could fund it in some way.

**Mr. Sullivan** said no, mainly because of Constitutional separation of power issues, ethical, and practical issues. Asking the parties to fund it would ensure the legislation's failure. The victims are already incurring tremendous costs to fight their case in court. Expert witness fees, life care plan, industrial hygiene experts, pulmonologists, it was a complex and costly undertaking. Inflicting the cost of trial on them also would be

too great. These cases were considered to be publicly funded for the constituency of the state.

**SEN. HOLDEN** asked the Justice if he knew the language of the bill. **Mr. Regnier** replied he did.

**SEN. HOLDEN** asked about page 1 line 29, section 2 concerning the appointment of the judge by the Supreme Court rather than the Governor appointing the judge. **Mr. Regnier** said the process began with the parties both stipulating to the judge pro tem. After that, the Supreme Court would appoint according to the stipulation. The appointment referred to 3-5-115.

**SEN. DOHERTY** provided guidance. He didn't think it was unusual to appoint special masters (judges pro tem) by a court or the Supreme Court for matters of complex litigation. He said it was common practice, and a temporary judgeship, not permanent. If the Governor appointed, and Senate confirmed, it would be permanent and it would require permanent money.

**SEN. HOLDEN** referred to section 3, regarding venue selection and asked if a fair hearing would be feasible in any part of the state. **Mr. Regnier** replied there was a better chance at a fair trial the further removed from Libby the trial was held. The venue section was the last section drafted.

**{Tape : 3; Side : A}**

He felt that both sides wanted to get a stipulation on the venue even before a bill was drafted. He confirmed that the stipulation had already been made.

**SEN. HOLDEN** asked what would happen if they didn't agree. **Mr. Regnier** responded that the court wouldn't hear those cases.

**SEN. GRIMES** asked about the stipulated venue language and if it should be tightened or if the legislature should construct a list of the possible venues. **Mike Prezeau, District Court Judge of the 19<sup>th</sup> Judicial District**, personally favored leaving as much discretion to the asbestos judge as possible and not limit the criteria. He said a movie and a book naming W.R. Grace, *A Civil Action*, had been out, but still 5 juries had been chosen in Libby. He said it was surprising how uncontaminated people were.

**Closing by Sponsor:**

**SEN. CRISMORE** closed on SB 282 by touching on the fact that he'd been in contact with W.R. Grace and said they hoped the bill would pass. He reiterated the importance to Lincoln County and

statewide that the bill pass. He noted the leadership support of the bill.

**ADJOURNMENT**

Adjournment: 11:45 A.M.

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SEN. LORENTS GROSFIELD, Chairman

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ANNE FELSTET, Secretary

LG/AFCT

**EXHIBIT** (jus36aad)